Filed 3/6/17 P. v. Geray CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON GERAY, Defendant and Appellant.	H043338 (Santa Clara County Super. Ct. No. CC814931)

I. INTRODUCTION

Defendant Jason Geray appeals after the trial court denied his petition for resentencing pursuant to Penal Code section 1170.18,[1] which was enacted as part of Proposition 47. At the time he requested resentencing, defendant was serving a sentence of 19 years after pleading no contest to assault with a deadly weapon (§ 245, subd. (a)(1)) and admitting three prior conviction allegations, including an allegation that he had served one prior prison term (§ 667.5, subd. (b)) for his prior felony conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

Defendant sought a one-year reduction in his sentence on the ground that the Sacramento County Superior Court had redesignated his felony conviction for possession of a controlled substance (Health & Saf. Code, § 11377 subd. (a)) as a misdemeanor

[1] All further statutory references are to the Penal Code unless otherwise indicated.

under section 1170.18, and therefore the conviction could not be used to enhance his sentence under section 667.5, subdivision (b) as a prison prior. The trial court denied defendant's petition after determining that the resentencing provisions of Proposition 47 did not apply retroactively to an enhancement previously imposed under section 667.5, subdivision (b). For the reasons stated below, we agree and therefore we will affirm the trial court's order.

Defendant also has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

II. BACKGROUND

A. *The Underlying Convictions*

In 2010 defendant pleaded no contest to assault with a deadly weapon (§ 245, subd. (a)(1)).[2] Defendant admitted an allegation that he had served a prior prison term (§ 667.5, subd. (b)) for his felony conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Defendant also admitted allegations that he had two prior convictions, each of which qualified as a strike (§§ 667, subd. (b)-(i); 1170.12) and as a serious felony (§ 667, subd. (a)). The trial court struck one of the prior strike allegations and sentenced defendant to a total term of 19 years, which included a one-year enhancement under section 667.5, subdivision (b) for the prison prior.

B. *Legal Background: Proposition 47*

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (the Act). (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 amended certain statutes to reduce those offenses to

[2] The facts underlying defendant's convictions were not included in the record on appeal.

misdemeanors and also added new misdemeanor offenses. (§ 1170.18, subd. (a); *People v. Chen* (2016) 245 Cal.App.4th 322, 326.)

Proposition 47 also included provisions for resentencing. A defendant who is currently serving his or her sentence for a felony conviction, and who would have been guilty of a misdemeanor if the Act had been in effect at the time of the offense, may file an application to have the felony conviction resentenced as a misdemeanor. (§ 1170.18, subd. (a).) If the petitioner satisfies the criteria in section 1170.18, subdivision (a), the trial court must recall the petitioner's felony sentence and resentence the petitioner to a misdemeanor unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

C. *Petition for Resentencing*

In 2016 defendant filed a petition for a writ of habeas corpus in propria persona that the trial court construed as a petition for resentencing pursuant to section 1170.18. Defendant contended that his sentence should be reduced by one year because the Sacramento County Superior Court had granted his petition to redesignate his prior felony conviction for violating Health & Safety Code section 11377, subdivision (a) as a misdemeanor pursuant to section 1170.18, and therefore the conviction could not be used to enhance his sentence under section 667.5, subdivision (b) as a prison prior.

The trial court denied the petition for resentencing in the court's February 16, 2016 order after determining that the resentencing provisions of Proposition 47 do not apply retroactively to enhancements previously imposed under section 667.5, subdivision (b). Defendant filed a timely notice of appeal from the February 16, 2016 order.

III. DISCUSSION

Defendant contends that the trial court erred in denying his petition for resentencing because once "the conviction that formed the basis of a prison prior is no

longer a felony conviction, the prison prior is no longer valid, and a current sentence[] based on the prison prior that is no longer valid is unauthorized."[3] As support for this contention, defendant relies upon the language of section 1170.18, subdivision (k), which states: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except [for firearm possession]."

Defendant argues that the plain language of section 1170.18, subdivision (k) provides that where a felony conviction is redesignated as a misdemeanor, the former felony conviction is considered a misdemeanor for all purposes except firearm possession, and therefore the conviction cannot be the basis of a sentencing enhancement previously imposed under section 667.5, subdivision (b).

To evaluate defendant's contentions, we must determine whether the "misdemeanor for all purposes" language of section 1170.18, subdivision (k) applies retroactively. Retroactive application would allow resentencing of a defendant whose sentence was enhanced pursuant to section 667.5, subdivision (b) because he or she had served a prior prison term where the trial court has redesignated the underlying felony conviction as a misdemeanor pursuant to section 1170.18, subdivision (a).

Since our analysis requires statutory interpretation, our standard of review is de novo. "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a

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[3] The issue is before the California Supreme Court. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900 ["This case presents the following issue: Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?"].) (http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2135098&doc_no=S232900.)

whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

To determine whether a statute should be construed to operate retroactively, we begin with the California Supreme Court's instruction that section 3 provides the "default rule": " 'No part of [the Penal Code] is retroactive, unless expressly so declared.' " (*People v. Brown* (2012) 54 Cal.4th 314, 319.) We are also aided by this court's overview of the rules governing the prospective or retroactive application of statutes in *People v. Whaley* (2008) 160 Cal.App.4th 779, 793-794 (*Whaley*). "The rules of statutory construction require us to consider legislation as being ' " ' "addressed to the future, not to the past." ' " ' [Citation.] 'It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise. [Citations.]' [Citations.] 'We may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history. [Citation.]' [Citation.] Nonetheless, 'in the absence of an express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' [Citations.] Although ' "no talismanic word or phrase is required to establish retroactivity," ' there nonetheless must be a clear manifestation or an 'unequivocal and inflexible' assertion of retroactivity. [Citation.]" (*Ibid.*)

The provision of Proposition 47 stating, at section 1170.18, subdivision (k), that "[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except [for firearm possession]" does

not include any language indicating that its application is retroactive. Defendant has not directed us to any extrinsic sources, such as the ballot materials for Proposition 47, that indicate the voters intended retroactive application. (See *Whaley, supra*, 160 Cal.App.4th at pp. 793-794.) Moreover, our review of the ballot materials did not reveal any language suggesting that the voters intended that section 1170.18, subdivision (k) be applied retroactively. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 3, subds. (3)-(5), p. 70; *id.*, analysis of Prop. 47 by Legislative Analyst, pp. 35-36.)

In the absence of either an express retroactivity provision or an expression of voter intent that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) be applied retroactively, we determine that the application of section 1170.18, subdivision (k) is prospective only. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 ["the phrase 'shall be considered a misdemeanor for all purposes' in section 1170.18, subdivision (k) does not apply retroactively"].)

Defendant relies on *People v. Park* (2013) 56 Cal.4th 782 (*Park*) for a contrary interpretation of the "misdemeanor for all purposes" language in section 1170.18, subdivision (k), but that decision does not support his interpretation. In *Park* our high court construed the "misdemeanor for all purposes" language of section 17, subdivision (b) which provides: " 'When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . .' " (*Park, supra*, at p. 789, fn. 4.)

The issue before our high court in *Park* was "whether a defendant adjudged guilty of a serious felony that has been reduced to a misdemeanor under section 17, subdivision (b)(3), and then dismissed pursuant to section 1203.4, subdivision (a)(1), is subject to sentence enhancement under section 667(a) in a subsequent criminal proceeding for having previously been convicted of a serious felony." (*Park, supra*, 56

Cal.4th at pp. 788-789, fn. omitted.) The *Park* court determined that "courts have long recognized that reduction of a wobbler to a misdemeanor under what is now section 17(b) generally precludes its use as a prior felony conviction in a *subsequent* prosecution." (*Id*. at p. 794, italics added.) For that reason, the court ruled that the defendant's current felony sentence could not be enhanced under section 667, subdivision (a) because the underlying past felony conviction had been reduced to a misdemeanor pursuant to section 17, subdivision (b) *prior* to the commission of the present offense. (*Park*, *supra*, at p. 787.) Thus, the decision in *Park* implicitly instructs that the "misdemeanor for all purposes" language in section 17, subdivision (b) is applied prospectively in subsequent prosecutions.

Our Supreme Court has further instructed that "[w]here the language of a statute uses terms that have been judicially construed, ' "the presumption is almost irresistible" ' that the terms have been used ' "in the precise and technical sense which had been placed upon them by the courts." ' [Citations.] This principle applies to legislation adopted through the initiative process. [Citation.]" (*People v. Weidert* (1985) 39 Cal.3d 836, 845-846 (*Weidert*).) Since the "misdemeanor for all purposes" language in section 17, subdivision (b) has been construed to apply prospectively in a subsequent prosecution by our Supreme Court in *Park*, *supra*, 56 Cal.4th at page 794, we presume that the voters intended that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) also applies prospectively in subsequent prosecutions. (See *Weidert*, *supra*, at pp. 845-846; see also *People v. Feyrer* (2010) 48 Cal.4th 426, 439 [under § 17, subd. (b)(3) if a defendant is granted probation on a wobbler offense and a misdemeanor sentence is ultimately imposed, "the offense is a misdemeanor from that point on, but not retroactively"].)

Defendant also argues that the "misdemeanor for all purposes" language of section 1170.18, subdivision (k) must be construed to require the trial court to strike the section 667.5, subdivision (b) one-year sentence enhancement in order to comport with

the stated purpose of Proposition 47 to reduce the punishment for those offenses now classified as misdemeanors. However, as the Attorney General points out, the purpose of a sentence enhancement under section 667.5, subdivision (b) is different. "Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) In other words, "[t]he purpose of the section 667.5(b) enhancement is 'to punish individuals' who have shown that they are ' "hardened criminal[s] who [are] undeterred by the fear of prison." ' [Citation.]" (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) Consistent with that purpose, Proposition 47 did not provide a procedure for striking a section 667.5, subdivision (b) enhancement retroactively where the underlying conviction was a felony at the time the section 667.5, subdivision (b) sentence enhancement was imposed. (See *People v. Jones* (2016) 1 Cal.App.5th 221, 224-225 (*Jones*), review granted Sept. 14, 2016, S235901.)[4]

For these reasons, we conclude that the trial court did not err in denying defendant's petition for resentencing, and we will affirm the February 16, 2016 order.

IV. DISPOSITION

The February 16, 2016 order is affirmed.

[4] We cite the decision in *Jones*, *supra*, 1 Cal.App.5th at pp. 224-225 for "potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1).)

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.